Supreme Court, U.S.
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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

NORTH STAR STEEL COMPANY,
Petitioner,

v.

CHARLES A. THOMAS, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in actions brought under the federal Worker Adjustment and Retraining Notification Act, the applicable limitations period should be drawn from Section 10(b) of the National Labor Relations Act rather than state law.

PARTIES TO PROCEEDINGS BELOW AND RULE 29.1 STATEMENT

Petitioner/Defendant Below

North Star Steel Company ("North Star") is a wholly-owned subsidiary of Cargill, Inc., which is a privately-held corporation. None of Cargill's shareholders is itself a publicly-traded entity.

Respondents/Plaintiffs Below

Respondents are Charles A. Thomas; Darren Boop; Robert W. Bower; William D. Bridge; James Clingan; Neil B. Housner; Jonathan L. Noaker; Wayne D. Orner; Gerald W. Ranck; Harold E. Van Sickle, Jr.; Richard A. Winter; and Eugene L. Witmer, Sr.

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PETITION FOR WRIT OF CERTIORARI

North Star Steel Company ("North Star") respectfully petitions for a Writ of Certiorari to review the judgment and opinion of the court of appeals in this case.

OPINIONS BELOW

The Opinion of the court of appeals (App. 1a-16a) is reported at 32 F.3d 53. The decision of the district court is reported at 838 F. Supp. 970. (App. 17a-25a) A further decision of the district court (App. 26a-28a) is not reported.

JURISDICTION

The court of appeals entered its judgment on August 10, 1994. (App. A). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Worker Adjustment and Retraining Notification Act ("WARN"), 29 U.S.C. § 2101 *et seq.*, is set forth in Appendix D at 29a to 37a. Section 10(b) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 160(b), is set forth in the same appendix at 38a.

STATEMENT OF THE CASE

Respondents, former salaried employees of North Star, filed their Complaint on October 22, 1992 in the United States District Court for the Middle District of Pennsylvania. They alleged they were entitled to damages under the WARN Act because they were laid off twenty months earlier without receiving advance notice. On April 1, 1993, North Star moved for summary judgment on grounds that Respondents' action was time-barred by the six-month statute of limitations set forth in Section 10(b) of the NLRA. The district court agreed and on May 25, 1993 granted North Star summary judgment. However, on August 10, 1994, the Third Circuit reversed this decision, declaring, in accordance with the view of the Second Circuit, that state law controls the applicable WARN limitations period.

Two weeks later, on August 24, 1994, a conflict among the circuits developed when the Fifth Circuit, under virtually identical factual circumstances, held that the Section 10(b) limitations period governed the timeliness of WARN actions, and expressly rejected the reasoning of its sister appellate courts. On October 31, 1994, the Sixth Circuit also adopted the Section 10(b) limitations period for WARN. Thus, the courts of appeals which have addressed this issue are now evenly divided on this critical question.

I. The North Star Plant Closing And Previous Litigation.

On February 25, 1991, North Star ceased production and laid off approximately 270 employees at its Milton, Pennsylvania steel plant. After suffering a WARN-

defined "employment loss" later that year, the United Steelworkers of America ("USWA"), a union representing approximately 250 employees at the Milton plant, filed a complaint in federal court on September 9, 1991 alleging that North Star had violated the WARN Act by failing to give the Union sixty days advance notice of the closing. On April 9, 1992, the district court granted USWA's motion for summary judgment on liability, holding that the layoff constituted a "plant closing" subject to WARN. In a separate order dated December 11, 1992, the district judge determined the number of days for which the company was required to pay WARN damages. *United Steelworkers v. North Star Steel Co.*, 809 F. Supp. 5 (M.D. Pa. 1992), *aff'd in relevant part*, 5 F.3d 39 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 1060 (1994).

Respondents, twelve salaried employees at the Milton plant, were unrepresented by USWA and, thus, unaffected by the *United Steelworkers* litigation. However, on October 22, 1992—more than six months after the district court's determination of a violation and more than 20 months after the layoff occurred—Respondents filed this action seeking to collect their own WARN damages against North Star.

II. The Proceedings Below.

On April 1, 1993, North Star moved for summary judgment on grounds that the Respondents' action was time-barred. Noting that the WARN Act itself contained no statute of limitations, North Star argued that the court should "borrow" the limitations period set forth in Section 10(b) of the NLRA. In response, the Respondents argued that their complaint was timely filed because the court instead should borrow a longer statute of limitations from state law, such as the three-year limitations period contained in the Pennsylvania Wage Payment and Collection law.

On May 25, 1993, the district court granted North Star's motion for summary judgment. Applying *DelCostello* v. *International Brotherhood of Teamsters*, 462 U.S. 151 (1983), the court determined that the NLRA provided a closer analogy to WARN than any available state statute and that the federal policies at stake and the practicalities of litigation made it more appropriate to borrow the NLRA limitations period.

On appeal, Respondents' claim was consolidated with the appeal of Crown Cork & Seal Co., an employer that had been unsuccessful in asserting the Section 10(b) limitations period in another WARN action in the Eastern District of Pennsylvania. *United Steelworkers v. Crown Cork & Seal Co.*, 833 F. Supp. 467 (E.D. Pa. 1993), *aff'd*, 32 F.3d 53 (3d Cir. 1994). In reversing the judgment for North Star and affirming the judgment against Crown Cork the court of appeals held that the most closely analogous state statute of limitations, rather than the six-month statute of limitations set forth in the NLRA, should govern WARN actions. Although it acknowledged that "none of the possible state laws provide [sic] perfect analogies to WARN," that "courts have looked to NLRA cases in interpreting WARN," and "that there are some definitional overlaps" between the two federal statutes, it nonetheless interpreted *DelCostello* to require application of a state limitations period. (App. 10a). The Third Circuit reached this decision despite being unwilling —or perhaps unable—to decide which of a multitude of possible state limitations periods would now actually control WARN actions in Pennsylvania.

REASONS FOR GRANTING THE PETITION

The Third Circuit's decision in this case, which is in accord with *United Paperworkers International Union Local 340 v. Specialty Paperboard, Inc.*, 999 F.2d 51 (2d Cir. 1993), conflicts directly with the Fifth Circuit's subsequent holding in *Halkias v. General Dynamics Corp.*, 31 F.3d 224, *en banc rehearing granted*, Nos. 93-1664, 93-1680, 93-8204, 1994 WL 520351 (5th Cir. Sept. 22, 1994), and with the Sixth Circuit's even more recent decision in *United Mine Workers v. Peabody Coal Co.*, No. 93-6020, 1994 WL 590188 (6th Cir. Oct. 31, 1994). At the district court level, conflicting decisions as to the WARN limitations period are also proliferating rapidly, and the need for instruction from this Court is acute. Judicial resources are too scarce, and the financial burden on litigants too large, for the Court to allow this important issue to fester unabated in the lower courts. Moreover, the decisions of the Second and Third Circuits are erroneous, and the need to clarify and redirect the convoluted law of limitations "borrowing" is important.

I. THE THIRD CIRCUIT'S REFUSAL TO BORROW THE SECTION 10(b) LIMITATIONS PERIOD FOR WARN ACTIONS CONFLICTS WITH THE RULINGS OF THE FIFTH AND SIXTH CIRCUITS AND AGGRAVATES A GROWING SPLIT IN AUTHORITY AMONG THE DISTRICT COURTS.

Under WARN, employers having at least one hundred employees are subject to civil liability if they fail to give their employees at least sixty days written notice of a statutorily-defined "plant closing" or "mass layoff." 29 U.S.C. §§ 2101-2109. However, "[a]s is often the case in federal civil law," *DelCostello*, 462 U.S. at 158, the WARN statute does not contain an express limitations period.

Initially, district courts confronted with WARN limitations questions analogized the facts to "hybrid" Section 301/duty of fair representation claims and "borrowed"

the six-month statute of limitations contained in Section 10(b) of the NLRA. *See Newspaper & Mail Deliverers' Union v. United Magazine Co.*, 809 F. Supp. 185, 188-92 (E.D.N.Y. 1992), *on reconsideration*, No. CV 92-0449 (ADS), 1993 WL 308138 (E.D.N.Y. Apr. 10, 1993); *Staudt v. Glastron Inc.*, No. SA-92-CA-1174, 1993 WL 85356, at *2 (W.D. Tex. Feb. 23, 1993), *aff'd sub nom. Halkias v. General Dynamics Corp.*, 31 F.3d 224 (5th Cir. 1994), *rehearing en banc granted*, Nos. 93-1664, 93-1680, 93-8204, 1994 WL 520351 (5th Cir. Sept. 22, 1994). Subsequently, at least four other district court rulings also adopted the NLRA's six-month limitations period for WARN actions.[1]

However, shortly after the *United Magazine* and *Staudt* cases were decided, other district courts began to reach different conclusions regarding the appropriate WARN limitations period. Refusing to borrow the Section 10(b) period, these courts instead applied various state statutes of limitations to determine the timeliness of WARN claims.[2]

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[1] *See Halkias v. General Dynamics Corp.*, 825 F. Supp. 123 (N.D. Tex. 1993), *aff'd*, 31 F.3d 224 (5th Cir. 1994), *rehearing en banc granted*, Nos. 93-1664, 93-1680, 93-8204, 1994 WL 520351 (5th Cir. Sept. 22, 1994); *Cureington v. General Dynamics Corp.*, No. 93-1680 (N.D. Tex. 1993), *aff'd sub nom. Halkias v. General Dynamics Corp.*, 31 F.3d 224 (5th Cir. 1994), *en banc rehearing granted*, Nos. 93-1664, 93-1680, 93-8204, 1994 WL 520351 (5th Cir. Sept. 22, 1994); *Thomas v. North Star Steel Co.*, 838 F. Supp. 970, 972-75 (M.D. Pa. 1993), *rev'd sub nom. United Steelworkers v. Crown Cork & Seal Co.*, 32 F.3d 53 (3d Cir. 1994); *United Mine Workers v. Peabody Coal Co.*, No. 92-0073-0 (CS) (W.D. Ky. June 30, 1993), *aff'd*, No. 93-6020, 1994 WL 590188 (6th Cir. Oct. 31, 1994).

[2] *United Steelworkers v. Crown Cork & Seal Co.*, 833 F. Supp. 467, 467-70 (E.D. Pa. 1993), *aff'd*, 32 F.3d 53 (3d Cir. 1994); *Automobile Mechanics' Local No. 701 v. Santa Fe Terminal Servs., Inc.*, 830 F. Supp. 432, 435-37 (N.D. Ill. 1993); *Wholesale & Retail Food Distrib. Local 63 v. Santa Fe Terminal Servs., Inc.*, 826 F. Supp. 326, 329-31 (C.D. Cal. 1993) (applying California limitations period after determining that defendant had waived limi-

This division among the district courts as to the proper WARN limitations period has now split the courts of appeals as well. In *Specialty Paperboard*, 999 F.2d at 51, the Second Circuit sided with the district courts that had found WARN not sufficiently analogous to the NLRA to warrant application of the federal limitations period. The same outcome was reached by the Third Circuit in the instant case. (App. A).

However, in *Halkias* and *Peabody Coal*, the Fifth and Sixth Circuits have drawn an opposite conclusion. In *Halkias*, in affirming a series of district court rulings which adopted Section 10(b) as the proper limitations period for WARN, the Fifth Circuit noted "the necessity for a uniform limitations period for WARN claims," and found the NLRA to be "a closer analogy than available state statutes." 31 F.3d at 233, 241 (citing *DelCostello*, 462 F.2d at 171-72). In *Peabody Coal*, the Sixth Circuit also affirmed a district court's application of the Section 10(b) limitations period, finding that "Section 10(b) of the NLRA provides the more analogous limitations provision and better effectuates the policies underlying WARN . . . ." 1994 WL 590188 at *8. In their rulings, the Fifth and Sixth Circuits expressly rejected the holdings and rationale of their sister circuits. *Halkias*, 31 F.3d at 228; *Peabody Coal*, 1994 WL 590188 at *6.

With the district and appellate courts now almost evenly divided, there is no realistic prospect for resolution of this vexing limitations question without a decision by the Court. All future decisions on this issue will simply side with one camp or the other, incrementally shifting the weight of authority in one direction or the other. Furthermore, without a real constituency for the establish-

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tations defense); *Frymire v. Ampex Corp.*, 821 F. Supp. 651, 653-55 (D. Colo. 1993); *Wallace v. Detroit Coke Corp.*, 818 F. Supp. 192, 194-97 (E.D. Mich. 1993).

ment of limitations periods, there is little hope that Congress will act to resolve this issue.[3]

Obviously, no benefit can be derived from the continual ad hoc determination of the WARN limitations period in the lower courts. The cost in judicial time and attorneys' fees is too high to permit this constant distraction from the underlying merits of the parties' WARN claims, to say nothing of the courts' need to address other pressing substantive issues. Now that the strengths and weaknesses of each position have been thoughtfully analyzed below, this case presents a timely vehicle for the Court to determine definitively the appropriate WARN limitations period.

II. RESOLUTION OF THE QUESTION PRESENTED BY THIS PETITION IS VITALLY IMPORTANT.

A. WARN Needs a Final, Uniform Limitations Period.

The current state of WARN limitations law is entirely unsatisfactory to both litigants and the courts. Unless the court grants certiorari in this case, an incalculable number of hours will be wasted as judges are continually forced to revisit this limitations question—time that obviously would be better dedicated to other matters.

Moreover, in those circuits (such as the Second and Third) that opt for a state limitations period, the work of bench and bar is only beginning. Litigants and judges in these courts will now be forced to spend their time and resources "characterizing" their WARN claims and then

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[3] In 1990 Congress enacted a "fallback" statute of limitations for all civil claims arising under federal legislation passed after December 1, 1990. 28 U.S.C. § 1658. However, despite the recommendation of the Federal Courts Study Committee, Congress was unable, or unwilling, to set limitations periods for the vast array of pre-existing federal statutes, such as WARN, that do not contain them. *See* Kimberly Norwood, *28 U.S.C. § 1658: A Limitation Period With Real Limitations*, 69 Ind. L. J. 477, 503-04 (1994).

analogizing them to each forum state's various causes of actions and statutes of limitations. Because these characterizations will vary from state to state, and even likely from judge to judge, WARN limitations law will be long plagued by uncertainty and confusion—to say nothing of the possibilities for forum shopping. *See Agency Holding Corp. v. Malley-Duff & Associates,* 483 U.S. 143, 147 (1987) (concluding that "a uniform statute of limitations [was] required to avoid intolerable 'uncertainty and time-consuming litigation.'") (citation omitted).

The few existing attempts to analogize WARN to state causes of action have demonstrated the overwhelming problems of borrowing state law in this area. For example, while the Second Circuit in *Specialty Paperboard* determined that Vermont's six-year statute of limitations for breach of contract actions should fix the WARN limitations period, another court characterized WARN as most analogous to California's three-year residual limitations statute. *Wholesale & Retail Food Distrib. Local 63 v. Santa Fe Terminal Servs., Inc.,* 826 F. Supp. 326, 330 (C.D. Cal. 1993). The Sixth Circuit summarized this growing confusion resulting from state law borrowing as follows:

> The suggestions of possibly analogous limitations periods run the gamut from the catchall limitations period advocated here to those governing contracts or torts. Even the *Specialty Paperboard* and *Wallace* courts, which agreed that state contract limitations periods should apply, did so for divergent reasons. Add to these limitations periods, arguments that can be raised under state unemployment laws, state wage laws, state benefit laws, state plant closing laws, and the opportunities are endless. Thus, selecting a WARN limitations period implicates the same concerns for uniformity present in *Agency Holding Corp.*

Peabody Coal, 1994 WL 590188 at *7.

Given the obvious need to end this senseless "characterization" odyssey though state law, and the obvious benefit of having an important federal statute interpreted consistently throughout the nation, Section 10(b) should be adopted as the uniform WARN limitations period. Because the Third Circuit failed to reach this conclusion, Petitioner's certiorari request should be granted.

B. The Current Limitations Borrowing Doctrine Is Flawed and Should Be Re-examined.

Although the practical need for a final, uniform WARN limitations period alone warrants Supreme Court review, Petitioner submits that this case raises broader questions concerning the overall wisdom of the current limitations borrowing doctrine. That doctrine originated last century, when the federal judiciary under the guise of the Rules of Decision Act began "borrowing" state statutes of limitations whenever Congress failed to provide a limitations period in federal law.[4] *See, e.g., Campbell v. City of Haverhill,* 155 U.S. 610 (1895); *McCluny v. Silliman,* 28 U.S. (3 Pet.) 270 (1830).

In more recent times, the Court has rejected the idea that the Rules of Decision Act formally mandates the imposition of state limitations periods on federal actions. *DelCostello v. International Brotherhood of Teamsters,* 462 U.S. 151, 160 n.13 (1983) (rejecting reliance "on a few turn-of-the-century cases suggesting that the Rules of Decision Act compels application of state limitations periods"). Later Court decisions have concurred in this view. *See, e.g., Agency Holding Corp.,* 483 U.S. at 143.

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[4] Rules of Decision Act, ch. 20, § 34, 1 Stat. 73, 92 (1789) (now codified with minor changes at 28 U.S.C. § 1652). The Rules of Decision Act then provided: "[T]he laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." *Id.* (footnote omitted).

See also Joseph L. Calamari, Note, *The Limited Reach of DelCostello v. International Brotherhood of Teamsters: A Statute of Limitations in LMRDA Title I Actions*, 56 Fordham L. Rev. 227, 245 n.19 (1987) ("Both the majority approach and Justice Scalia's view agree that the Rules of Decision Act does not mandate application of state limitations periods because the Act merely begs the question, authorizing federal courts to use state laws 'in cases where they apply.' ") (citations omitted).

Although reliance on the Rules of Decision Act has been discredited, the practice of using state law to determine unspecified federal limitations periods has not. Without deeper contemplation, the Court has premised its continued borrowing of state limitations periods on the belief that Congress "intends by its silence that we borrow state law." *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 355 (1991) (quoting *Agency Holding Corp.*, 483 U.S. at 147).

However, it now is clear that the Court's rationale, to the extent that it ever held credence, is no longer tenable. In enacting the post-1990 "fallback" statute of limitations, 28 U.S.C. § 1658, *Congress explicitly stated that the continued absorption of state limitations periods for federal statutes is undesirable.* As the Senate noted:

> Statutes of limitations provide a specific time period after the contested event within which a case must be commenced. At present, the federal courts "borrow" the most analogous state law limitations period for federal claims lacking limitations periods. *Borrowing, while defensible as a decisionable approach in the absence of legislation, appeals* [*sic*] *to lack persuasive support as a matter of policy.*
>
> It also creates several practical problems: It obligates judges and lawyers to determine the most analogous state law claim; it imposes uncertainty on litigants; reliance on varying state laws results in undesirable variance among the federal courts and disrupts the

> development of federal doctrine on the suspension of limitations periods.

See 136 Cong. Rec. S17,581 (daily ed. Oct. 27, 1990) (statement of Sen. Biden) (emphasis added).[5]

Congress has not been alone in recognizing the defects in the current limitations borrowing scheme. Indeed, Senator Biden's remarks in the Congressional Record were excerpted from the findings of the 1990 Report of the Federal Courts Study Committee, appointed by Chief Justice Rehnquist. *See* Federal Courts Study Committee, Judicial Conference of the United States, *Report of the Federal Courts Study Committee* (1990). The Study Committee's analysis of *DelCostello* reflects the opinion of many members of the federal bench. *See, e.g., Norris v. Wirtz,* 818 F.2d 1329, 1332 (7th Cir.) ("This is one tottering parapet of a ramshackle edifice. Deciding which features of state periods of limitations to adopt for which federal statutes wastes untold hours.") (citation omitted), *cert. denied,* 484 U.S. 943 (1987).

Recent commentaries have echoed these legislative and judicial doubts about the wisdom of continued state limitations borrowing and have drawn attention to the obvious adverse impact that this current policy has on the equitable administration of federal rights. One commentator summarized these concerns as follows:

> [B]orrowing state time-bars for federal claims causes serious equitable concerns. The state legislatures do not consider the federal interests at issue when they adopt a statute of limitations for a particular state right or category of state rights. Accordingly, the

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[5] The House Report on Section 1658 contains similar language. *See* H. R. Rep. No. 734, 101st Cong., 2d Sess. 24 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6860, 6870. As commentators have noted, Section 1658 "addresses only a small portion of the borrowing problem because it is limited to new federal statutes." Katherine F. Nelson, *The 1990 Federal "Fallback" Statute Of Limitations: Limitations By Default,* 72 Neb. L. Rev. 454 (1993).

> litigants' interests in the federal right, as well as society's interest in having that right asserted, are not part of the state's balancing process.
>
> * * *
>
> More importantly, borrowing state time-bars leads to the inequitable administration of federal rights. One of the main reasons for enacting a federal law, rather than leaving the problem to the states, is the need for uniformity. When the courts borrow state limitations periods for federal claims, federal rights vary from state to state because each state has its own statutes of limitations.

Nelson, 72 Neb. L. Rev. at 454 (footnotes omitted). *See also* Norwood, 69 Ind. L.J. at 512-13 ("[W]henever a state enjoys the right to decide the longevity of a federal statutory claim, federal interests are automatically frustrated. . . . [A] national cause of action should [not] affect litigants differently depending upon the state in which the plaintiff is able to meet jurisdictional and venue requirements.") (footnotes omitted).

Congress, the Study Committee, and those commentators clearly are correct in drawing attention to the serious flaws in prevailing limitations borrowing practice. Consequently, this case presents an opportunity for the Court to address these perceived shortcomings in the borrowing doctrine and to provide much-needed practical guidance on the WARN limitations question. Given the importance of these issues, and the far-reaching split among the circuits, the Court should grant this petition.

III. THE DECISION OF THE THIRD CIRCUIT IS ERRONEOUS UNDER EXISTING SUPREME COURT PRECEDENT.

Although Petitioner believes that the Court should review the entire underpinning of its borrowing doctrine, it also believes that the Third Circuit's decision in this case is clearly wrong under existing precedent. This Court

has held repeatedly that a federal limitations period should be borrowed whenever the federal statute provides a "closer analogy" than state law, and where "federal policies" and "the practicalities of litigation" support such a decision. *See DelCostello*, 462 U.S. at 171-72. In the instant case, by overlooking the close analogy between WARN and the NLRA, by ignoring longstanding federal labor policy favoring rapid settlement of employment disputes, and by failing to recognize the danger of inappropriate forum shopping, the Third Circuit has erroneously imposed an unspecified and unsuitable state statute of limitations on WARN proceedings, clearly contrary to existing precedent.

A. The Framework of the Limitations Debate.

In overturning the early Rules of Decision Act cases, *DelCostello* substituted a doctrine that continued the preference for absorbing state statutes of limitations, but also acknowledged the propriety of borrowing limitations periods from federal law in appropriate cases. As the Court observed, "[s]tate legislatures do not devise their limitations periods with national interests in mind," and thus "state statutes of limitations can be unsatisfactory vehicles for the enforcement of federal law." *Id.* at 161 (quoting *Occidental Life Ins. Co. v. Equal Employment Opportunity Commission*, 432 U.S. 355, 367 (1977)). Based on these principles, the Court adopted the following standard for federal limitations borrowing:

> [W]hen a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking, we [will] not hesitat[e] to turn away from state law.

DelCostello, 462 U.S. at 172. The Court described the continued preference for borrowing state statutes as "a sort of fallback rule of thumb." *Id.*, 462 U.S. at 160 n.12.

Utilizing this approach, the *DelCostello* Court applied the NLRA's Section 10(b) limitations period to a "hybrid" Section 301/duty of fair representation claim brought by an employee against both his employer and the union. *Id.* at 165. Subsequently, Section 10(b) also was applied to other federal employment provisions that contained no limitations period. *See, e.g., West v. Conrail,* 481 U.S. 35 (1987) (applying Section 10(b) to Railway Labor Act); *Haggerty v. USAir, Inc.,* 952 F.2d 781 (3d Cir. 1992) (Section 10(b) applied to worker dislocation provisions contained in Airline Deregulation Act); *Aluminum, Brick & Glassworkers Int'l Union Local 674 v. A.P. Green Refractories, Inc.,* 895 F.2d 1053, 1054-55 (5th Cir. 1990) (NLRA period applied to "pure" Section 301 actions under Labor Management Relations Act).

The *DelCostello* federal borrowing rule also has been utilized in civil actions arising from substantive laws outside the labor field. For example, in *Agency Holding Corp. v. Malley-Duff & Associates,* 483 U.S. 143 (1987), the Court extended the limitations period contained in the Clayton Antitrust Act to civil RICO claims. The Court did so after finding the federal statute to be a "far closer analogy . . . than any state law alternative," noting the "similarities in purpose and structure" between the two federal statutes and recognizing the potential for forum shopping if diverse state limitations periods were applied. *Id.* at 150-52. *See also Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson,* 501 U.S. 350 (1991) (Court found federal limitations period applicable to claims brought under Section 10(b) of the Securities Exchange Act).

B. The Third Circuit Misapplied *DelCostello* and Its Progeny.

Although much of the above precedent was cited in the Third Circuit's decision, it was largely misapplied. The court of appeals failed to give sufficient weight to the obvious similarities between WARN and the NLRA, failed

to adequately consider the long-standing federal policy favoring quick resolution of labor and employment disputes, and failed to recognize that forum shopping likely will result from the borrowing of multiple state limitations periods.

1. ***WARN is "closely analogous" to the NLRA, and dissimilar from any potential state statute of limitations.***

Although the Third Circuit conceded it should apply Section 10(b)'s six-month limitations period to WARN if the NLRA provided "a closer analogy than available state statutes," the court mistakenly found insufficient similarities between the two federal statutes. (App. 5a). The court compounded its error by not even attempting to analogize WARN to the proposed state statutes of limitations—an exercise possibly abandoned due to the obvious dissimilarities between WARN and those provisions.

a. *WARN and the NLRA impose parallel notification requirements on employers and are structurally similar.*

In *Halkias,* the Fifth Circuit correctly observed that "[t]he NLRA is more than just analogous to WARN; in fact, WARN may be thought of as an outgrowth of the NLRA, because §§ 8(a)(1) and 8(a)(5) of the NLRA . . . have [both] been interpreted to require an employer to notify a union of its decision to close a plant." 31 F.3d at 232 (citing *Penntech Papers, Inc. v. National Labor Relations Bd.*, 706 F.2d 18, 26 (1st Cir.) (NLRA requires employer to provide "timely notice to the union of the decision to close"), *cert. denied,* 464 U.S. 892 (1983)). *See also Dubuque Packing Co.,* 303 N.L.R.B. 386 (1991) (NLRB imposes affirmative duties on employers resulting from decision to close plant), *review granted in part, enforcement granted in part, remanded,* 1 F.3d 24 (D.C. Cir. 1993), *cert. dismissed,* 114 S. Ct. 2157 (1994).

In addition to recognizing that both WARN and the NLRA impose requirements upon employers implementing workforce reductions, several courts have commented on the obvious structural similarities between the two federal statutes. " '[T]he family resemblance is undeniable, and indeed there is a substantial overlap' between them." *Halkias*, 31 F.3d at 231 (quoting *DelCostello*, 462 U.S. at 170) (not discussing WARN); *see also Peabody Coal*, 1994 WL 590188 at *3 ("WARN cross-references the NLRA in several respects."); *United Magazine*, 809 F. Supp. at 191 ("the relationship between WARN and the NLRA is strengthened" by linguistic similarities); *accord Thomas v. North Star Steel Co.*, 838 F. Supp. 970, 973 (M.D. Pa. 1993), *rev'd sub nom. United Steelworkers v. Crown Cork & Seal Co.*, 32 F.3d 53 (3d Cir. 1994). In fact, WARN's definitional borrowing from the NLRA occurs in both the actual text of WARN (*see* 29 U.S.C. § 2103(2), providing that NLRA "economic strikers" are not entitled to notice, and 29 U.S.C. § 2101(a)(4), incorporating NLRA definition of "exclusive representative"), and in the Labor Department's implementing regulations. *See, e.g.*, 20 C.F.R. § 639.3(d) (1994) (defining "representative" for WARN purposes by explicit reference to §§ 9(a) and 8(f) of the NLRA); 20 C.F.R. § 639.3(a)(1)(II) (1994) (defining "reasonable expectation of recall"); 20 C.F.R. § 639.3(a)(2) (1994) (defining "independent contractors and subsidiaries" by reference to NLRA case law).

b. *The close relationship between WARN and the NLRA has been recognized by all three branches of government.*

Given the linguistic overlap between WARN and the NLRA, "it is not surprising that, like the Department of Labor, federal courts have [also] turned to NLRA case law in interpreting WARN." *Halkias*, 31 F.3d at 232. Indeed, in *United Steelworkers*, the earlier action against North Star arising from the same factual circumstances,

the court borrowed provisions of the NLRA to determine prejudgment interest and attorney's fees. 809 F. Supp. at 9-10. *See also, e.g., Damron v. Rob Fork Mining Co.*, 739 F. Supp. 341, 344 (E.D. Ky. 1990) (adopting NLRA's "reasonable expectation of recall" standard for determining similar provision in WARN), *aff'd*, 945 F.2d 121 (6th Cir. 1991).

That WARN and the NLRA are substantially entwined is fully documented in the statute's legislative history. During the Senate floor debate on WARN, the ranking minority member of the Senate Labor Committee cautioned that WARN "constitutes a major change in the National Labor Relations Act; so much that it basiacally [sic] . . . amend[s] the [NLRA]." 134 Cong. Rec. 15923, 15924 (1988) (remarks of Senator Hatch). After WARN's enactment, the National Labor Relations Board's General Counsel likewise "predicted substantial interplay between the new law [WARN] . . . and the nation's basic labor law administered by the NLRB." *Halkias*, 31 F.3d at 231-32 (quoting 226 Daily Lab. Rep. (BNA) A-3 (Nov. 23, 1988)).

c. *The Third Circuit erroneously discounted WARN's interrelationship with the NLRA.*

Despite these recognized analogies between the two statutes, the Third Circuit's decision in this case rests on a supposed "lack of similarity between the NLRA and WARN." (App. 10a, n.2). To support this conclusion—remarkable in light of the above-quoted passages—the court described WARN as a "substantive" statute, while maintaining that the NLRA "is concerned with ensuring an equitable bargaining process." (App. 7a) (citation omitted). The Third Circuit also maintained that the statutes were not analogous because, allegedly unlike the NLRA, "[t]he benefits of WARN accrue not only to unionized workers but to all workers alike." (App. 8a).[6]

[6] In *Specialty Paperboard*, the Second Circuit justified its borrowing of Vermont's six-year residual limitations period on similar

However, as the Fifth Circuit noted in *Halkias*, the Third Circuit's reasoning is both factually flawed and premised on a distorted understanding of this Court's precedent. First, as *Halkias* notes, the Third Circuit's attempt to draw a distinction between the "procedural" purpose of the NLRA and the "substantive" nature of WARN is preposterous:

> The purposes of the NLRA are similar to those of WARN. Both regulate labor-management relations: WARN, by requiring notice of impending layoffs and terminations; the NLRA, by facilitating concerted action by employees and governing collective bargaining procedures. Both do so to achieve similar objectives.
>
> * * *
>
> WARN's purpose may be seen as a subset of the NLRA's . . . .

Id. See also Thomas, 838 F. Supp. at 973 ("While the specific rights created by [WARN and the NLRA] are different, the policies behind each of the acts are consistent, mutually-reinforcing, and to some extent identical.").

Moreover, even assuming, *arguendo*, that a distinction between the procedural and substantive "purposes" of the statutes could be discerned, the Third Circuit would still be without a sufficient foundation to deny federal borrowing. As the Fifth Circuit observed,

> [a] strict identity of purposes is not a requisite for borrowing a limitations period from one federal statute for use in another. To the contrary, a federal

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grounds. *See Specialty Paperboard*, 999 F.2d at 54-55 ("purpose of WARN, unlike that of the NLRA, is not to ensure labor peace but to alleviate the distress associated with job loss . . ."; WARN "has only a tangential effect on collective bargaining"). *See also* A. Kent Mayo, Comment, *Warning! This Claim Will Not Self-Destruct In Six Months—The Second Circuit Applies A State Statute Of Limitations To Claims Arising Under The 1988 Worker Adjustment And Retraining Act*, 72 Wash. U. L.Q. 545 (Spring, 1994) (outlining Second Circuit's reasoning).

> statute's limitations period is to be borrowed if, among other things, it provides a closer analogy than available state statutes. If an identity of purposes were required, it would seem that the Court would not have borrowed the Clayton Act's limitations period in establishing a uniform period for RICO.

Halkias, 31 F.3d at 233 (citations and quotations omitted). *See also Peabody Coal*, 1994 WL 590188 at *7 ("[D]espite admitted differences between WARN and the NLRA, both are designed to afford protection against job loss—a safeguard that goes to the heart of the employment relationship . . . . '[T]his similarity of purpose' provides the analogy necessary to extend section 10(b) outside the parameters of the NLRA.") (citation omitted).

Similarly in error is the Third Circuit's belief that the NLRA protects only unionized employees. Like WARN, the NLRA clearly applies regardless of whether the affected employees are represented by a union. *See, e.g., National Labor Relations Bd. v. Columbia Univ.*, 541 F.2d 922, 931 (2d Cir. 1976) ("there can be little doubt that the protection afforded to concerted activities under the NLRA applies equally to workers in unionized or in non-unionized firms"); *Hugh H. Wilson Corp. v. National Labor Relations Bd.*, 414 F.2d 1345, 1347 (3d Cir. 1969) ("The mantle of protection of concerted activities . . . extends to both union and non-union employees") (footnotes omitted), *cert. denied*, 397 U.S. 935 (1970).

d. ***The Third Circuit erred by applying Pennsylvania law without finding any analogy between WARN and the applicable state limitations periods.***

In addition to these misinterpretations of statutory intent and court precedent, the Third Court also erred by failing to actually review the state statutes that it declared to be more analogous to WARN than the NLRA. *See DelCostello*, 462 U.S. at 172 (federal law applies if it provides "closer analogy than available state statutes").

Had it attempted such a review, the court no doubt would have found precious little analogy between state law and WARN.

At the appellate level, for example, Respondents recommend no fewer than three alternative state limitations periods: the three-year Pennsylvania Wage Payment and Collection Law, Pa. Stat. Ann. tit. 43, § 260.9a(g) (1992); the six-year state "residual" statute of limitations, 42 Pa. Cons. Stat. Ann. § 5527 (1994); and Pennsylvania's two-year statute for enforcing civil penalties, 42 Pa. Cons. Stat. Ann. § 5524(5) (1994).[7] However, in *Haggerty v. USAir, Inc.*, 952 F.2d 781, 787 (3d Cir. 1992), the Third Circuit rejected the applicability of this same group of limitations periods to a similar claim for damages under the Airline Deregulation Act's worker dislocation provisions. Moreover, in considering a nearly identical array of Texas statutes in the context of WARN, the Fifth Circuit drew the following conclusion equally applicable to the Pennsylvania provisions:

> In sum, canvassing the possible Texas periods reveals none as analogous to WARN as the NLRA. None seeks to accommodate the same, or very similar, interests as WARN, much less govern an action that will frequently overlap with WARN. And, needless to say, none embraces causes of action that share common language with WARN.[8]

Halkias, 31 F.3d at 235-36 (footnotes omitted). *See also Peabody Coal*, 1994 WL 590188 at *7 ("The only com-

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[7] For obvious timeliness reasons, Respondents did not proffer the six-month limitations period contained in the Pennsylvania Human Relations Act, Pa. Stat. Ann. tit. 43, § 959(h) (1994).

[8] At the trial court level, where a comparison between the NLRA and potential Pennsylvania limitations periods was made, the court expressly determined that "the framework and goals of the National Labor Relations Act are such that it is more analogous to the Worker Adjustment and Retraining Notification Act than to any state statute of which we are aware." (App. 22a).

monality between WARN and the proffered state statute is that both are pieces of legislation.").

Accordingly, by failing to credit the widely-recognized analogies between WARN and the NLRA and by refusing to even consider the obvious differences between WARN and the available state limitations periods, the Third Circuit has misapplied the precedent of *DelCostello* and *Lampf*.

2. *The federal interests at stake in the quick resolution of labor disputes support reversal of the Third Circuit's decision.*

As *DelCostello* also holds, courts should "not hesitat[e] to turn away from state law" when "the federal policies at stake and the practicalities of litigation" support the borrowing of a federal limitations period. *Id.*, 462 U.S. at 172. In the instant case, by failing to recognize that the quick resolution of labor disputes is an important federal interest fully applicable to WARN, the Third Circuit clearly compounded its misapplication of the *DelCostello* criteria and committed reversible error.

a. *Congress and the courts repeatedly impose short limitations periods in federal labor matters.*

The speedy resolution of employment disputes is a longstanding cornerstone of federal labor policy. *See Halkias*, 31 F.3d at 238 ("federal labor policy has long favored the rapid settlement of disputes between an employer and an employee"); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960) (discussing strong federal policy in favor of speedy resolution of industrial disputes through arbitration). Where Congress has included limitations periods in federal statutes affecting the employer/employee relationship, the filing deadlines have been consistently short. *See, e.g.*, National Labor Relations Act § 10(b), 29 U.S.C. § 160(b) (providing six-month limitations period for fil-

ing unfair labor practice charge before NLRB); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(e) (requiring that an employment discrimination charge be filed with the EEOC within 180 days, or 300 days in a deferral state, of the discriminatory act); Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 626(d) (imposing a similar 180/300 day deadline for filing an age discrimination charge).

Given these statutory pronouncements, it is hardly surprising that the courts have generally "borrowed" comparable—and, therefore, short—federal limitations periods where Congress has not specified a limitations period for employment-related legislation. *See, e.g., DelCostello,* 462 U.S. at 168 (borrowing NLRA's six-month limitations period for "hybrid" Section 301/duty of fair representation claims); *Haggerty,* 952 F.2d at 787 (borrowing Section 10(b) limitations period for worker dislocation provisions of Airline Deregulation Act). *See also Lloyd v. United States Dep't of Labor,* 637 F.2d 1267, 1271 (9th Cir. 1980) (approving one-year limitations period for "retraining, adjustment and relocation" benefits under Federal Trade Act of 1974); *Occidental Chemical Corp. v. International Chem. Workers Union,* 853 F.2d 1310, 1315 (6th Cir. 1988) ("Given the desirability of a rapid resolution of disputes over an arbitrator's award, three months appears to us to be a more appropriate limit than six for an action attacking the validity of an award.").

b. *A short limitations period is equally appropriate for WARN.*

Despite this established preference for short labor limitations periods, the Third Circuit brushed aside its applicability in a single paragraph. Without addressing the existence of other federal employment provisions, the court described the burden of filing an unfair labor practice charge under the NLRA as "minimal," and concluded

simply that "a short statute of limitations could very well frustrate the policies behind WARN." [9]

However, even a cursory examination of pertinent legislative history compels the conclusion that federal policy favoring the quick resolution of employment disputes was intended to be fully applicable to WARN. As the Senate Report indicated, WARN "establishes a comprehensive system for providing *prompt* adjustment and training services to dislocated workers." S. Rep. No. 62, 100th Cong., 1st Sess. 2 (1987) (emphasis added). The Sixth Circuit found it extremely significant that WARN only requires employers to provide laid off workers with 60 days advance notice—a time limitation that also determines the maximum compensatory damages available to employees who do not receive this required notice:

> By implementing a 60-day notice requirement, Congress clearly intended to provide short-term relief not only to affected employees, but to their communities and supporting state agencies as well. This purpose of bridging what would otherwise be a drain on resources would be defeated if not rapidly implemented. A prolonged statute of limitations would do nothing to achieve WARN's aim of starting employees on the road to retraining and reemployment before unemployment becomes a problem.

Peabody Coal, 1994 WL 590188 at *7.

The Sixth Circuit's view—that the expediency requirements built into WARN require a short limitations period—has been shared by others. One commentator summarized the underlying Congressional intent as follows:

> [B]ecause WARN was intended to aid displaced workers by giving them time to seek other employ-

[9] The Second Circuit applied a similar rationale in *Specialty Paperboard*, 999 F.2d at 55 (short statute of limitations under NLRA justified by "minimal" burden to pursue unfair labor practice charge).

> ment or training before being terminated, applying a state statute of limitations of several years or more does not serve the policy underlying WARN. Recovering damages several years after being laid off will not help a terminated employee search for immediate training or employment. Rather, these damages would merely ameliorate the employee's general living conditions, a remedy beyond the scope of WARN.

Mayo, 72 Wash. U. L.Q. at 557 (footnotes omitted). *See also Halkias*, 31 F.2d at 239 ("[A]pplication of expansive limitations periods would disserve WARN's most specific objective: the provision of a cushion of time for employees to explore other job opportunities and, if necessary, seek retraining.").

Moreover, the need for a short WARN limitations period is also evident from the typical state of an employer's business following a plant closing or mass layoff. If WARN plaintiffs were allowed several years to bring suit, it likely would be quite difficult, if not impossible, to obtain the requisite records and documentation necessary to determine liability or damages, and increasingly difficult to locate key witnesses and claimants.[10] *See Halkias*, 31 F.3d at 238-39. One need not stretch the imagination to envision the burdens on both the court and the employer in handling a WARN claim asserted several years after the fact—as would likely occur under the lengthy state limitations periods suggested below. Despite the Third Circuit's avoidance of these issues, Congress clearly could not have intended such a deviational result.

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[10] In keeping with the short limitations periods for labor and employment claims, federal law only requires employers to retain payroll records indicating the names of employees and their paid remuneration for a period of three years. 29 C.F.R. § 516.5; 29 C.F.R. § 1627.3(a). If long state limitations periods for WARN actions are permitted—such as the Second Circuit's use of a six-year Vermont period—courts will no doubt be confronted with stale WARN claims where the records needed to answer fundamental liability and damage issues will have been destroyed.

3. *The Third Circuit erroneously discounted the danger of forum shopping.*

The Third Circuit was also wrong in dismissing Petitioner's argument that the "practicalities of litigation" favor the borrowing of a uniform federal limitations period. In its appellate brief, Petitioner noted that the WARN Act's expansive jurisdictional provision—which permits an action to be brought not only in "any district in which the violation is alleged to have occurred" but also in any district "in which the employer transacts business"—created an easy mechanism for forum shopping that could only be prevented by the adoption of a uniform federal limitations period. 29 U.S.C. § 2104(a)(5). *See Lampf,* 501 U.S. at 357 (availability of forum shopping weighs heavily in favor of uniform federal standard). Quoting the Second Circuit's analysis in *United Paperworkers Union Local 340 v. Specialty Paperboard, Inc.,* 999 F.2d 51, 56 (2d Cir. 1993), the Third Circuit summarily dismissed this concern by contending that "courts will have little difficulty in determining which state's law to apply and workers will gain few advantages by suing in a court far from the site of injury." 32 F.3d at 60 (footnote omitted).

However, as *Halkias* observed, the Second and Third Circuits' suggestion that this choice of laws problem presents "little difficulty" is fallacious. If, for example, a plaintiff who loses his job in state X were to bring a WARN claim in state Y because state Y has a longer statute of limitations, there is little reason under existing federal law to believe that the court in state Y would impose state X's shorter limitations period. *See Halkias,* 31 F.3d at 237 (in "examining borrowing cases involving a conflict over which state's limitation period should apply, we find a consistent preference for borrowing the forum state's"). *See also Wang Labs., Inc. v. Kagan,* 990 F.2d 1126, 1128 (9th Cir. 1993) ("[i]n an ERISA case, we ordinarily borrow the forum state's statute of limita-

tions"); *Vigman v. Community Nat'l Bank & Trust Co.*, 635 F.2d 455, 459 (5th Cir. 1981) ("[w]hen federal law contains no limitations period applicable to a particular federal cause of action, federal courts are to apply the forum state's limitations period."). Given this precedent and WARN's expansive jurisdictional reach, the Sixth Circuit determined that, "in today's national and international corporate environment," application of varying state limitations periods would result in a "limitless" opportunity for forum shopping. *Peabody Coal,* 1994 WL 590188 at * 6.

Furthermore, an additional danger of forum shopping under WARN will occur when a single employment decision affects employees in different states. The scope of recent WARN litigation indicates that this will be a recurring factual development. In *Halkias,* for example, the WARN plaintiffs could certainly have filed suit in Texas, Oklahoma or Missouri (the three states where the layoff occurred) and—had they considered it—might have selected any other state in which General Dynamics transacts business. *See Halkias,* 31 F.3d at 237 ("Given the possibility for multistate WARN litigation, the issue of which state's limitations period should control might become an issue of time-consuming litigation.").

In light of these dangers, "the federal policies at stake and the practicalities of litigation" clearly point toward the borrowing of a uniform federal statute of limitations for WARN. *Halkias,* 31 F.3d at 229. By failing to give adequate attention to these important considerations, the Third Circuit misconstrued this Court's precedent and committed reversible error.

CONCLUSION

For each of the foregoing reasons, North Star's Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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November 7, 1994

APPENDICES

BEST AVAILABLE COPY

APPENDIX A

Filed August 10, 1994

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 93-2008 and 93-7613

UNITED STEELWORKERS OF AMERICA,
AFL-CIO-CLC

v.

CROWN CORK & SEAL CO., INC.,
Appellant (in No. 93-2008)

CHARLES A. THOMAS; DARREN BOOP; ROBERT W. BOWER; WILLIAM D. BRIDGE; JAMES CLINGAN; NEAL B. HOUSNER; JONATHAN L. NOAKER; WAYNE D. ORNER; GERALD W. RANCK; HAROLD E. VAN SICKLE, JR.; RICHARD A. WINTER; EUGENE L. WITMER, SR.,
Appellants (in No. 93-7613)

v.

NORTH STAR STEEL COMPANY

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 92-CV-05968)

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. No. 92-CV-01507)

Argued May 24, 1994

Before: Cowen and Roth, *Circuit Judges*
Ackerman, *District Judge* *

(Filed August 10, 1994)

OPINION OF THE COURT

ACKERMAN, *District Judge.*

These two cases present the following discrete issue: In an action brought pursuant to the Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2101 *et seq.* ("WARN"), a statute which, like so many others, fails to explicitly provide a statute of limitations, should we follow the general rule and borrow a state statute of limitations or should we instead opt for the six-month statute of limitations set forth in section 10(b) of the federal National Labor Relations Act. The two cases present the identical issue for review and we will consider both cases in this Opinion.

For the reasons detailed below, we find that for cases arising under WARN, courts should apply the most closely analogous state statute of limitations. Thus, we will reverse the decision in *Thomas v. North Star Steel* and will affirm the decision in *United Steelworkers of America v. Crown Cork & Seal.*

Background

Both of the underlying cases were filed pursuant to WARN, a federal statute which requires companies with one hundred or more employees to provide their workers

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*** Honorable Harold A. Ackerman, United States District Judge for the District of New Jersey, sitting by designation.**

with a minimum of sixty days written notice before a plant closing or mass layoff.[1] Employers who fail to provide the requisite notice must compensate employees suffering an employment loss for each day of the violation. The statute creates a private civil action for damages in federal court.

On September 9, 1991, the United Steelworkers of America, AFL-CIO-CLC, filed a complaint in federal court alleging that the North Star Steel Company ("North Star") had violated the WARN Act by failing to give the union sixty days advance notice of a February 25, 1991 layoff of about 270 people, at the company's Milton, Pennsylvania plant. Although the suit was filed more than six months after the layoff occurred, North Star did not raise the statute of limitations as a defense. On April 9, 1992, the district court granted the union's motion for summary judgment on liability, holding that the layoff constituted a "plant closing" subject to WARN. In a separate Order, dated December 11, 1992, the district judge determined the number of days for which the company was required to pay WARN damages. *United Steelworkers v. North Star Steel,* 809 F. Supp. 5, 6-7 (M.D. Pa. 1992), *aff'd* 5 F.3d 39 (1993).

Appellants were non-unionized employees of North Star, unrepresented by the union and hence unaffected by the union's successful lawsuit against North Star. They therefore filed a separate action, the instant case, also seeking damages pursuant to WARN. On May 25, 1993, the district court granted North Star's motion for summary judgment, finding that the action was barred under

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[1] The statute defines "plant closing" as the permanent or temporary shutdown of a single site of employment, which results in an employment loss to a certain minimum number of employees. 29 U.S.C. § 2101(a)(2). "Mass layoff" is defined as a reduction-in-force, resulting from a plant closing, which results in a certain minimum employment loss. 29 U.S.C. § 2101(a)(3). A layoff must last more than six months before it qualifies as actionable under WARN. 29 U.S.C. § 2101(a)(6)(B).

what it deemed to be the applicable statute of limitations. The employees' motion for reconsideration was denied on August 26, 1993. This appeal followed.

United Steelworkers of America v. Crown Cork & Seal Co., Inc. ("Crown Cork"), arises out of an event that took place on September 30, 1991. On that day, the company ordered a reduction-in-force and shutdown of its Perry, Georgia plant. As a result of this reduction in force, about 85 employees were terminated. On October 15, 1992, the United Steelworkers of America (the union) filed a complaint, alleging that the company violated WARN by failing to give it 60 days notice prior to the shutdown. Crown Cork & Seal then moved for summary judgment, contending that the action was barred by the applicable statute of limitations. The district court denied the motion on August 24, 1993 but in an order dated September 26, 1993, certified the August order for immediate interlocutory appeal pursuant to 28 U.S.C. § 1292.

We have jurisdiction over the appeal in *Thomas v. North Star Steel* pursuant to 28 U.S.C. § 1291. Our jurisdiction over *United Steelworkers of America v. Crown Cork & Seal* arises from our October 13, 1993 Order granting the company permission to appeal pursuant to 28 U.S.C. § 1292(b). Our review over both cases is plenary.

Discussion

In this case we visit a general question of federal law that we have repeatedly addressed: When a federal statute does not contain an explicit statute of limitations, when is it appropriate to borrow a statute of limitations from elsewhere in federal law rather than adopting the most closely analogous state statute of limitations.

The companies argue that in this case, a federal statute —the six-month statute of limitations contained in section 10(b) of the National Labor Relations Act ("NLRA") for filing a claim of an unfair labor practice with the Na-

tional Labor Relations Board ("NLRB")—provides the most appropriate limitations period. The employees and the union exhort us to borrow one of various state statutes. Courts addressing the question have adopted both approaches. Some have borrowed the six-month § 10(b) statute; *see, e.g., Newspaper and Mail Delivers' Union of N.Y. and Vicinity v. United Magazine Co.*, 809 F. Supp. 185 (E.D.N.Y. 1992) (adopting NLRA statute); *Staudt v. Glastron, Inc.*, No. SA-92-CA-1174, 1993 WL 85356, 1993 U.S. Dist. LEXIS 3090 (W.D.Tex. February 23, 1993) (same). Other courts, including the only Court of Appeals to reach the question, have expressly considered and rejected the section 10(b) six-month period, instead opting for various state law limitations periods. *See, e.g., United Paperworkers Local 340 v. Specialty Paperboard, Inc.*, 999 F.2d 51 (2d Cir. 1992) (hereinafter *United Paperworkers*); *Wallace v. Detroit Coke Corp.*, 818 F. Supp. 192 (E.D. Mich. 1993) (rejecting NLRA statute and adopting six-year state contract statute); *Automobile Mechanics' Local No. 701 of the Int'l Assoc. of Machinists & Aerospace Workers v. Santa Fe Terminal Services, Inc.*, 830 F. Supp. 432 (N.D. Ill. 1993) (rejecting NLRA statute and adopting, without specifying, most analogous state statute).

The two district court opinions before us now reached contrary conclusions. The district court in *North Star Steel* adopted the six-month statute of limitations set forth in § 10(b); the court in *Crown Cork & Seal* rejected the § 10(b) statute, and without deciding the appropriate statute of limitations, found the action timely under all of the possibilities.

Our analysis must begin with the general assumption that when a federal statute is silent as to a statute of limitations, the court should apply "the most closely analogous statute of limitations under state law." *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 158 (1983); *see also Lampf, Pleva, Lipkind, Prupis &*

Petigrow v. Gilbertson, 501 U.S. 350, ——, 111 S.Ct. 2773, 2778 (1991); *Haggerty v. USAIR, Inc.*, 952 F.2d 781, 783 (3d Cir. 1992). This general rule is not set in stone, however. Rather, the United States Supreme Court has recognized that, in order to prevent frustration of federal policy, it is sometimes more appropriate to borrow a limitations period from an analogous area of federal law. *DelCostello*, 462 U.S. at 162. This exception is "closely circumscribed", *see Reed v. United Transp. Union*, 488 U.S. 319, 324 (1989), and should only be applied "when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking". *DelCostello*, 462 U.S. at 172.

In following the principles enunciated in *DelCostello* and *Reed*, we repeatedly have recognized our duty "to take seriously [the Supreme Court's admonition] that analogous state statutes of limitations are to be used unless they frustrate or significantly interfere with federal policies." *Reed*, 488 U.S. at 327. For instance, the mere fact that a statute touches upon issues of labor law does not mean that the Court must resort to the statute of limitations contained in § 10(b) of the NLRA. Thus, in *Eichleay Corp. v. Intern. Ass'n of Bridge, Structural and Ornamental Iron Workers*, 944 F.2d 1047 (3d Cir. 1991), we applied a state statute of limitations for vacating arbitration awards to an action to enforce an arbitration awards pursuant to § 301 of the Labor Management Relations Act, 29 U.S.C. § 185. Similarly, in *Brenner v. Local 514, United Brothers of Carpenters*, 927 F.2d 1283 (3d Cir. 1991), we remanded the case to the district court to apply the most closely analogous state statute of limitations to a § 301 claim of retaliation against internal union activities. In *Grasty v. Amalgamated Clothing & Textile Workers Union*, 828 F.2d 123 (3d Cir. 1987), *cert. denied*, 484 U.S. 1042 (1988), we applied

Pennsylvania's four-year breach of contract statute of limitations to a union member's claim that the union failed to rebate dues and improperly charged disabled workers. In this case, as in those, the federal statute may be borrowed only if it clearly provides a closer analogy than the available state statutes. Answering this question requires us to focus on the respective policies behind the NLRA and WARN.

The primary purpose of the NLRA is "to protect the right of workers to join together in labor organizations and collectively bargain for the terms and conditions of employment." *United Paperworkers*, 999 F.2d at 54; *see also Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 20-21 (1987). The statute "is concerned with ensuring an equitable bargaining process, not with the substantive terms that may emerge from such bargaining." *Fort Halifax*, 482 U.S. at 20 (*citing Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985)). More specifically, as the Supreme Court noted in *Reed*, the NLRA has "effects upon the formation and operation of the collective-bargaining agreement between the employer and the bargaining representative, and upon the private settlement of disputes under that agreement through grievance-and-arbitration procedures". *Reed*, 488 U.S. at 329. The NLRA, then, is concerned with the importance and integrity of a process. From the NLRA's perspective, "minimum terms of employment" that may arise from another federal statute—or from the process of collective bargaining itself—are irrelevant so long as the process is fair.

The six-month statute of limitations set forth in § 10 (b) represents Congress's view of the proper balancing of the various interests involved in the process of collective bargaining. The six-month period takes into account "the national interests in stable bargaining relationships and finality of private settlements, and an employee's interest in setting aside what he views as an unjust settlement

under the collective-bargaining system." *DelCostello,* 462 U.S. at 171 (*quoting United Parcel Service, Inc. v. Mitchell,* 451 U.S. at 70-71 (1980) (opinion concurring in the judgment)). In *DelCostello* itself, it was precisely this direct effect on the collective bargaining process that led the Court to invoke the § 10(b) statute of limitations. That case involved a § 301 hybrid suit (1) against an employer for breach of a collective bargaining agreement pursuant to the NLRA, and (2) against a labor union for breach of the duty of fair representation. Such a hybrid action really alleges that the process of collective bargaining has broken down. Thus, the NLRA policies applied: "The employee's interest in setting aside the 'final and binding' determination of a grievance through the method established by the collective-bargaining agreement unquestionably implicates 'those consensual processes that federal labor law is chiefly designed to promote—the formation of the . . . agreement and the private settlement of disputes under it.'" *DelCostello,* 462 U.S. at 171 (*quoting Mitchell,* 451 U.S. at 70-71 (opinion concurring in judgment)).

In *DelCostello,* the parallels between the cause of action and the policies behind the NLRA were unmistakable. In *Reed,* however, the Supreme Court, while acknowledging that many employment-related statutes affecting labor will in some way affect the collective bargaining process, cautioned that even plausible "tangential and remote" effects upon collective bargaining are insufficient to warrant departure from the general rule. *Reed,* 488 U.S. at 330, 331. Thus, the Court refused to borrow the § 10(b) NLRA statute of limitations to govern a union member's free speech claim against the union.

WARN falls into this latter category—any effects it has on collective bargaining are tangential at best. The benefits of WARN accrue not only to unionized workers but to all workers alike. WARN, like dozens of other employment statutes which bestow substantive rights simply

"gives employees something for which they otherwise might have to bargain." *Fort Halifax*, 482 U.S. at 21 (addressing Maine plant closing law). That is why in that case, the Supreme Court held that the NLRA did not preempt a Maine statute providing protection to workers from plant closings. Unlike the NLRA, the Maine regulation "provide[d] protection to individual union and nonunion workers alike, and thus 'neither encourage[d] nor discourage[d] the collective bargaining processes . . . .'" *Fort Halifax*, 482 U.S. at 21 (*quoting Metropolitan Life*, 471 U.S. at 755). The WARN protections, like the Maine plant closing law discussed in *Fort Halifax*, is [sic] also properly understood as establishing part of the "backdrop" of rights that the parties bring to the collective bargaining table, and not as affecting the substantive rights that may emerge from the collective bargaining discussions. *Fort Halifax*, 482 U.S. at 21.

WARN serves a broader purpose as well, that goes beyond the employer-employee relationship addressed by the NLRA. The statute mandates that employers planning a plant closing or mass lay-off must notify the "chief elected official of the unit of local government within which such closing or layoff is to occur". 29 U.S.C. § 2102(a)(2). Employers who fail to comply with the provision are subject to civil penalties of $500 per day. 29 U.S.C. § 2104(a)(3). Thus, WARN serves very broad societal goals—to protect workers, their families and their communities in the wake of potentially harmful employment decisions. Its remedial nature really has very little to do with the day to day process of collective bargaining.

To be sure, it cannot be said that WARN has *no* effect on collective bargaining. The companies point out, for example, that under the NLRA, an employer must provide notice to represented workers, in order to give the workers the opportunity for meaningful bargaining. *See, e.g.*[,] *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681 (1981). This fact does present a superficial

rememblance between the NLRA and WARN, but on closer inspection, it highlights the difference. The rights bestowed by the NLRA focus solely on the need for a meaningful collective bargaining process; WARN provides an across-the-board substantive right. The implementing regulations of the statute highlight this crucial distinction by providing that "[c]ollective bargaining agreements may be used to clarify or [to] amplify the terms and conditions of WARN, but *may not reduce WARN rights.*" 20 C.F.R. § 639.1(g) (emphasis added). In other words, the NLRA requires notice to protect the meaningfulness of the collective-bargaining process; WARN's purpose is to substantively protect employees and their communities.

The fact that courts have looked to NLRA cases in interpreting WARN, and the fact that there are some definitional overlaps, does not change this fundamental distinction between the two statutes. At best, WARN has a family resemblance to the NLRA. In *Brenner v. Local 514, United Brothers of Carpenters,* 927 F.2d 1283 (3d Cir. 1991), we rejected the proposition that a family resemblance is sufficient to justify adopting the § 10(b) statute of limitations. There, we held that a claim against a union for breach of the duty of fair representation, while having some effect upon the collective bargaining atmosphere, did not have an effect sufficient enough to counsel adoption of the federal statute. *Id.* at 1295. In order to justify departing from the general rule, the analogy must be more direct.[2]

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[2] The lack of similarity between the NLRA and WARN becomes even starker when one looks at the remedies afforded by the respective statutes. Under the NLRA, the National Labor Relations Board has broad discretion to " 'take such affirmative action including reinstatement of employees . . . as will effectuate the policies of [the Act]' to remedy an employer's unfair labor practices." *Tubari Ltd., Inc. v. NLRB,* 959 F.2d 451, 453 (3d Cir. 1992). WARN by its very terms precludes such broad equitable relief; "[A] Federal court shall *not* have authority to enjoin a plant closing or mass layoff." (emphasis added). Similarly, the

As the Second Circuit pointed out in *United Paperworkers*, courts adopting the section 10(b) statute of limitations for WARN actions "have failed to grasp this crucial distinction between statutes which specifically regulate the collective bargaining relationship and those which remain peripheral to that concern." *United Paperworkers*, 999 F.2d at 55.

Nonetheless, despite the vast gulf between the respective policies behind the NLRA and WARN, the companies look for relief in our own prior decision of *Haggerty v. USAir*. Their reliance is misplaced. That case addressed the Employee Protection Program of the Airline Deregulation Act, 49 U.S.C. § 1552(d)(1) (1988) ("EPP"), a federal statute which provided certain air carrier employees with a right of first hire against other air carriers. The EPP directly affected the collective bargaining environment by impacting on "the seniority relationships of other employees . . . ." *Haggerty*, 952 F.2d at 787. As in *DelCostello*, this direct impact on the collective bargaining environment required a statute of limitations that furthered the need for the rapid resolution of labor disputes. And since, as we noted in *Haggerty* itself, the airline industry was nearly 90% unionized and the right-to-hire program was inserted into the statute at the insistence of unions, the six-month section 10(b) statute of limitations was the obvious choice.[3]

In determining whether to apply a federal statute of limitations, we also have considered whether the federal policies at stake and the practicalities of litigation make the NLRA statute "a significantly more appropriate ve-

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NLRB's discretion in awarding back pay is broad. *See Tubari*, 959 F.2d at 453. WARN, though, provides a strict statutory mechanism for computing damages.

[3] We also found that "as with the NLRA, the Department of Labor has had a role in administering the EPP as the agency charged with maintaining a listing of airline vacancies for the use of protected employees under the EPP." *Haggerty*, 952 F.2d at 787.

hicle for interstitial lawmaking". *DelCostello,* 462 U.S. at 172; *Haggerty,* 952 F.2d at 786. The companies argue that WARN requires a single federal statute of limitations, because subjecting the companies to multiple state statutes of limitations would make it difficult for employers to calculate their contingent liabilities.

This case simply does not present serious uniformity concerns. The need for uniformity becomes real only when the federal statute at issue contains numerous types of claims and legal theories or when the prospect of multiple state statutes of limitation[s] presents serious practical problems. Uniformity concerns motivated the Supreme Court in *Wilson v. Garcia,* 471 U.S. 261 (1985), to apply a uniform limitations period (a state limitations period in that case) to claims arising under 42 U.S.C. § 1983. As the Court pointed out, claims under the broad civil rights statute "would encompass numerous and diverse topics and subtopics." *Wilson,* 471 U.S. at 273. Thus, "[i]f the choice of the statute of limitations were to depend upon the particular facts or the precise legal theory of each claim, counsel could almost always argue, with considerable force, that two or more periods of limitations should apply to each § 1983 claim." *Id.* at 273-74. The Court used similar reasoning in *Agency Holding Corp. v. Malley-Duff & Associates, Inc.,* 483 U.S. 143 (1987): Since RICO "encompass[es] numerous diverse topics and subtopics . . . a uniform statute of limitations is required to avoid intolerable 'uncertainty and time-consuming litigation.' " *Id.* at 149-50 (*quoting Wilson,* 471 U.S. at 273, 272).

In *Haggerty,* we relied on uniformity concerns in deciding to apply the section 10(b) statute. Under the EPP, a protected employee who had been terminated or furloughed could claim a right of first hire with *any other carrier* that was hiring employees. We noted that airline carriers would have difficulty "managing a cohesive policy with respect to the EPP were they subject

to the varying limitations periods of each of the states in which they operate." *Haggerty*, 952 F.2d at 786. Thus, without a uniform federal statute of limitations, the entire airline industry faced constant and protracted uncertainty.

Unlike RICO and Section 1983, WARN contains but a single cause of action, and all WARN claims involve nearly identical fact patterns and discrete inquiries. And unlike the EPP, under which an airline may be the fortuitous victim of events involving other air carriers all across the country, WARN's obligations simply do not implicate such geographic concerns favoring uniformity. As the Second Circuit put it:

> "The term 'plant closing' as defined by the Act is limited to single sites of employment, and venue is limited to the district where the violation is alleged to have occurred or where the employer does business; unless a single plant site straddles the boundary between two states, it is unlikely prospective plaintiffs will have a broad choice of fora in which to bring their claims or that doubt will arise as to in which state triggering events occurred. Therefore, geographic considerations do not counsel for the application of a uniform federal limitations period for WARN Act claims." *United Paperworkers*, 999 F.2d at 56 (quoting district court opinion).

Because of these same factors, "courts will have little difficulty in determining which state's law to apply and workers will gain few advantages by suing in a court far from the site of injury." *United Paperworkers*, 999 F.2d at 56.[4]

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[4] Since the *Crown Cork & Seal* action occurred in Perry, Georgia, there is a question as to whether the statute of limitations should be borrowed from Georgia or Pennsylvania law. We have previously held that "as a general rule the governing statute of limitations should be that of the state in which the federal court sits, unless a party can make a compelling showing that the application

The companies' further concern about the effect of a plant closing on service of process, and on the mechanics of litigation, simply do not implicate federal concerns; rather, they are the same concerns at issue in every cause of action, whenever the statute of limitations is longer then [sic] a year or so.

On the other hand, a short statute of limitations could very well frustrate the policies behind WARN. As the Second Circuit found, under the complex administrative scheme of the NLRA, in which the NLRB plays a large and active role in prosecuting claims, "[t]he burden on complainants in pursuing a claim is minimal, justifying the short statute of limitations." *United Paperworkers,* 999 F.2d at 55. WARN does not contain those administrative safeguards, and a six-month statute could very well constitute too great a burden on the claimants.

Finally, cases finding that the practicalities of litigation favor adoption of a federal statute of limitations have focused on the problems with the potential state statutes. For example, in *DelCostello,* the Court pointed out that the two possible state statutes were inconsistent with the relevant federal policy favoring the finality of settlements and the opportunity to attack an unfair result under collective bargaining. The extremely short time periods in state arbitration statutes "fail to provide an aggrieved employee with a satisfactory opportunity to vindicate his rights under § 301 and the fair representation doctrine." *Id.* at 166. Conversely, the relatively lengthy time period

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of that statutory time bar would seriously frustrate federal labor policy or work severe hardship to the litigants." *Consolidated Express, Inc. v. New York Shipping Association, Inc.,* 602 F.2d 494, 507-08 (3d Cir. 1979), *vacated on other grounds,* 448 U.S. 902 (1980). We need not decide whether the statute of limitations should be borrowed from Pennsylvania or Georgia law, since no party has brought to the lower courts' attention a statute of limitations, from either state, under which the instant actions would be untimely.

governing legal malpractice claims "would preclude the relatively rapid final resolution of labor disputes favored by federal law—a problem not present when a party to a commercial arbitration sues his lawyer." *Id.* at 168.

Here, the state statutes of limitations brought to the lower courts' attention—which range from the two-year period for enforcing civil penalties under 42 Pa. Cons. Stat. Ann. § 5524(5) to Pennsylvania's six-year residual statute of limitations, 42 Pa. Cons. Stat. Ann. § 5527—do not interfere with federal policy.[5] Because of WARN's remedial nature and its limited effect on collective bargaining, a short statute of limitations is unnecessary. And none of the state statutes are so short as to interfere with a worker's potential for seeking or gaining relief. While we acknowledge that none of the possible state laws provide perfect analogies to WARN, the absence of a perfect analogy is an insufficient reason to depart from the general rule, particularly when federal law does not provide a satisfactory alternative. *See, e.g., DelCostello*, 462 U.S. at 171; *Gavalik v. Continental Can Co.*, 812 F.2d 834, 847 (3d Cir. 1987).

Here, we need not decide which state statute applies, since the actions would be timely under any of the possible statutes of limitations brought to the court's attention.

Conclusion

We conclude that, for the reasons detailed above, for actions arising under WARN, courts must apply the most closely analogous state statute of limitations. We therefore will affirm the district court's Order in *United Steelworkers of America v. Crown Cork & Seal* denying Crown Cork & Seal's motion for summary judgment. We will

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[5] Other possible state statutes of limitations include the three year period set forth in 43 Pa. Stat. Ann. § 260.9a(g) for bringing claims under the Pennsylvania Wage Payment and Collection Law, and the four year limitations period for breach of an implied contract, 42 Pa. Cons. Stat. Ann. § 5525(4).

reverse the Order of the district court in *Thomas v. North Star Steel* granting North Star's motion for summary judgment in favor of North Star. These cases will be remanded to the respective district courts for further proceedings consistent with this opinion. Costs taxed against the appellant in 93-2008. Costs taxed against the appellee in 93-7613.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

UNITED STATES DISTRICT COURT
M.D. PENNSYLVANIA

No. 4:CV-92-1507

CHARLES A. THOMAS, *et al.*,
Plaintiffs,

v.

NORTH STAR STEEL COMPANY, INC.,
Defendant.

May 25, 1993

ORDER

MUIR, District Judge.

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

On October 23, 1992, the Plaintiffs filed this action pursuant to the Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2101, *et seq.* The events which form the basis of this action occurred on February 25, 1991. On that date North Star Steel Company, Inc. (hereafter "North Star Steel"), laid off approximately 270 employees at its Milton, Pennsylvania, plant. The Plaintiffs allege that they are entitled to damages because they were laid off without any notice.

On April 1, 1993, the parties filed cross motions for summary judgment. Both of those motions have been fully briefed and are ripe for disposition.

The standard for summary judgment pursuant to Federal Rule of Civil Procedure 56 is well settled. Summary judgment is not proper where a reasonable jury could find for the non-moving party on a material issue of fact. Since a reasonable jury presumably needs more than a scintilla of evidence to find in favor of a party with the burden of persuasion, more than that amount of evidence must be produced by the non-movant in order to survive a summary judgment motion. The non-movant must present evidence beyond his or her pleadings to meet this requirement. *Williams v. Borough of West Chester,* 891 F.2d 458, 459-60 (3d Cir. 1989). We first address North Star Steel's motion for summary judgment.

In its motion North Star Steel argues that the Plaintiffs' claims are time barred because they commenced this action approximately 20 months after the events which gave rise to their cause of action. North Star Steel reasons that the appropriate statute of limitations for actions brought pursuant to the Worker Adjustment and Retraining Notification Act is six months. In response the Plaintiffs argue that their complaint was timely filed because the applicable statute of limitations is three years.

The Worker Adjustment and Retraining Notification Act does not contain an express statute of limitations. In such instances the United States Supreme Court has "generally concluded that Congress intended that the Courts apply the most closely analogous statute of limitations under state law." *Reed v. United Transp. Union,* 488 U.S. 319, 323, 109 S.Ct. 621, 625, 102 L.Ed.2d 665 (1989) (quoting *DelCostello v. Teamsters,* 462 U.S. 151, 158, 103 S.Ct. 2281, 2287, 76 L.Ed.2d 476 (1983)). However, that general principle does not apply

> when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a signifi-

> cantly more appropriate vehicle for interstitial lawmaking.

Id. (quoting *DelCostello,* 462 U.S. at 172, 103 S.Ct. at 2294).

The Plaintiffs assert that the general principle should be followed and that the statute of limitations in Pennsylvania's Wage Payment and Collection Law, which is three years, should be applied in this case.

The Wage Payment and Collection Law, 43 P.S. §§ 260.1 *et seq.,* does not create an employee's right to compensation but only establishes a right to enforce the payment of wages and compensation to which an employee is otherwise entitled. 43 P.S. § 260.5(a); *Weldon v. Kraft, Inc.,* 896 F.2d 793 (3d Cir. 1990). The Worker Adjustment and Retraining Notification Act differs from the Pennsylvania Wage Payment and Collection Law in that the former creates a statutory right to monetary damages when an employer violates its provisions.

In *Haggerty v. USAir, Inc.,* 952 F.2d 781 (3d Cir. 1992), the Court of Appeals for the Third Circuit declined to borrow the statute of limitations in the Pennsylvania Wage Payment and Collection Law in a case brought pursuant to a federal statute that did not contain a statute of limitations. The statute at issue in *Haggerty* was the Employee Protection Program which was an amendment to the Airline Deregulation Act. The Employee Protection Program "gave a protected employee not only a 'first right of hire' by any other air carrier but also a right to recall and [to] retention of seniority in his or her original air carrier employment." *Haggerty,* 952 F.2d at 785. That Program implicitly provided that an employee covered by it could bring an action based on the statutory rights that it created.

In deciding that the statute of limitations in the Pennsylvania Wage Payment and Collection Law did not ap-

ply to Haggerty's claim brought pursuant to the Employee Protection Program, the Court of Appeals stated that

> [t]he wage payment law is for payment of wages to employees, not for hiring claims, and it is premised on a contractual obligation that an employer has to pay wages and benefits, not a statutory right like the one here.

Id. at 786 (footnote omitted). That reasoning applies to this case because the Plaintiffs seek to enforce a statutory right established by the Worker Adjustment and Retraining Notification Act and their action is not premised on any pre-existing contractual obligation between them and North Star Steel. However, that conclusion does not end our inquiry.

We may decline to borrow a state statute of limitations only where: (1) a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes; and (2) when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking. *Reed v. United Transp. Union, supra.* North Star Steel argues that the National Labor Relations Act is the appropriate statute from which we should borrow the applicable statute of limitations. The statute of limitations in that Act is six months. 29 U.S.C. § 160(b).

We must determine whether the National Labor Relations Act is more analogous to the Worker Adjustment and Retraining Notification Act than any available state statute. We initially note that in another action against North Star Steel which had arisen from the same facts in this case, we analogized for the purposes of awarding prejudgment interest and of awarding attorney's fees an action brought under the Worker Adjustment and Retraining Notification Act to one pursuant to the National Labor Relations Act for the purposes of awarding prejudgment interest and of awarding attorney's fees. *United*

Steelworkers of America v. North Star Steel Corp., 809 F.Supp. 5 (M.D.Pa. 1993). We supplement our conclusion in that case with the following factors.

A number of the provisions in the Worker Adjustment and Retraining Notification Act apply specifically where the terminated employees are represented by a union and other provisions explicitly refer to the National Labor Relations Act. Both the National Labor Relations Act and the Worker Adjustment and Retraining Notification Act bestow statutory rights upon employees. While the specific rights created by each statute are different, the policies behind each of the acts are consistent, mutually-reinforcing, and to some extent identical.

The purposes of the National Labor Relations Act are

> to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

29 U.S.C. § 141(b).

The goal of the Worker Adjustment and Retraining Notification Act is to provide

> protection to workers, their families, and communities by requiring employers to provide notification 60 calendar days in advance of plant closings and mass layoffs. Advance notice provides workers and their families some transition time to adjust to the prospective loss of employment, to seek and obtain alternative jobs and, if necessary, to enter skill train-

> ing or retraining that will allow these workers to successfully compete in the job market.

20 C.F.R. § 639.1(a) (1992). Both statutes protect employees from job loss.

The analogy between the two statutes is strengthened by the fact that the regulations interpreting the Worker Adjustment and Retraining Notification Act provide that "[c]ollective bargaining agreements may be used to clarify or [to] amplify the terms and conditions of WARN, but may not be used to reduce WARN rights." 20 C.F.R. § 639.1(g) (1992). The collective bargaining procedure is one of the tools which the National Labor Relations Act placed in the hands of employees.

We are of the view that the framework and goals of the National Labor Relations Act are such that it is more analogous to the Worker Adjustment and Retraining Notification Act than to any state statute of which we are aware.

In the light of that conclusion we must decide whether the federal policies at stake and the practicalities of litigation make the rule borrowed from the National Labor Relations Act a significantly more appropriate vehicle for interstitial lawmaking than any state statute.

With respect to that issue, the United States Supreme Court has stated that the threshold inquiry is "whether all claims arising out of the federal statute 'should be characterized in the same way, or whether they should be evaluated differently depending upon the varying factual circumstances and legal theories presented in each individual case.'" *Agency Holding Corp. v. Malley-Duff & Assoc.'s,* 483 U.S. 143, 147, 107 S.Ct. 2759, 2762, 97 L.Ed.2d 121 (quoting *Wilson v. Garcia,* 471 U.S. 261 268, 105 S.Ct. 1938, 1942, 85 L.Ed.2d 254 (1985)). When making that inquiry, the Court of Appeals for the Third Circuit has stated that it "really entails an analysis

of whether claims under a statute are enough alike so that a uniform statute of limitations should be applied to all of them, at least on a state-by-state basis." *Haggerty*, 952 F.2d at 784 (footnote omitted). The Court of Appeals in *Haggerty* further reasoned that a uniform, federal statute of limitations should be applied to claims which arise "out of a similar factual matrix." *Id.* at 785-86.

We believe that claims pursuant to the Worker Adjustment and Retraining Notification Act arise out of factually-similar circumstances in that all such claims will encompass a plant closing or mass layoff of at least 100 employees. We next address the federal policies at stake and the practicalities of litigation pursuant to the Worker Adjustment and Retraining Notification Act.

A uniform statute of limitations applied nationwide is appropriate for claims brought pursuant to the Worker Adjustment and Retraining Notification Act because, as in *Haggerty*, "[a] lack of uniformity among the many state jurisdictions in which [the claims arise] can cause uncertainty for both employees and employers." *Id.* at 786. In the regulations passed pursuant to the Worker Adjustment and Retraining Notification Act, the Department of Labor has foreseen "that Federal rulemaking cannot address the multitude of industry and company-specific situations in which [the Act will apply]." 20 C.F.R. § 639.1(b) (1992). The Department of Labor's concerns appear to include potential complications caused by the application of a patchwork of different state laws to a single company. Although all actions arising under the Worker Adjustment and Retraining Notification Act may be based upon a factually-similar scenario, problems may arise as a result of "a major automaker which has dozens of automobile plants throughout the country." 20 C.F.R. § 639.3(a)(4). A uniform statute of limitations would benefit employees and employers when a single employer may be subject to liability pursuant to the Worker Adjustment and Retraining Notification Act in

various states. The practicalities of litigation arising under the Worker Adjustment and Retraining Notification Act favor a uniform, federal statute of limitations.

With respect to the federal policies at stake, we are of the view that the policies furthered by the Worker Adjustment and Retraining Notification Act mirror those which prompted passage of the National Labor Relations Act. There is a substantial federal interest in labor-management relations and the effect of mass layoffs on interstate commerce.

We conclude that in actions brought pursuant to the Worker Adjustment and Retraining Notification Act, it is appropriate to borrow the six-month statute of limitations set forth in the National Labor Relations Act. 29 U.S.C. § 160(b). Two other United States District Courts which have addressed the issue have reached the same result. *Newspaper & Mail Deliverers' v. United Magazine,* 809 F.Supp. 185 (E.D.N.Y. 1992); *Staudt v. Glastron, Inc.,* 8 Indiv. Empl. Rts. Cas. (BNA) 462, 1993 WL 85356 (W.D. Tex. 1993); *but see, Wallace v. Detroit Coke Corp.,* No. 92-72891 slip op., 1993 WL 104242 (S.D.N.Y. Feb. 26, 1993) (state statute of limitations applies in WARN action).

The Plaintiffs argue that North Star Steel should be equitably and collaterally estopped from asserting that the applicable statute of limitations is six months. However, the Plaintiffs have not shown that they relied upon any representation of North Star Steel and they have not shown that the issue of the statute of limitations had been raised in any case based on the same factual allegations. North Star Steel is not estopped from advancing the argument that the applicable statute of limitations is six months.

North Star Steel's motion for summary judgment should be granted because there are no material facts in dispute, the appropriate statute of limitations is six months, and

this action was filed approximately 20 months after the events upon which it is based had occurred.

In light of that conclusion, Plaintiffs' motion for summary judgment will be denied as moot.

NOW, THEREFORE, IT IS ORDERED THAT:

1. North Star Steel's motion for summary judgment based on the contention that this action is time barred is granted.

2. The Plaintiffs' motion for summary judgment is denied as moot.

3. The Clerk of Court shall enter judgment for North Star Steel.

4. The Clerk of Court shall close this file.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

No. 4:CV-92-1507

Complaint Filed 10/23/92

(Judge Muir)

CHARLES A. THOMAS, *et al.*,
Plaintiffs

vs.

NORTH STAR STEEL COMPANY, INC.,
Defendant

ORDER

August 26, 1993

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

On May 25, 1993, we granted Defendant North Star Steel Company, Inc.'s (hereafter "North Star Steel") motion for summary judgment. In that order we concluded that the applicable statute of limitations is six months and that this case was time-barred because the Plaintiffs brought it approximately 20 months after the facts upon which it is based occurred.

On June 10, 1993, the Plaintiffs filed a motion to vacate judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. After being granted an extension of time to do so, the Plaintiffs timely filed a brief in

support of that motion on July 19, 1993. North Star Steel filed its brief in opposition on August 6, 1993. The time allowed for the Plaintiffs to file a brief in reply has expired, they have filed none, and the matter is ripe for disposition.

The grounds upon which we may grant a motion pursuant to Rule 59(e) are limited. Such a motion may be based only upon (1) an intervening change in controlling law; (2) the presentation of new evidence not previously available which, if discovered previously might have affected the Court's decision; or (3) to correct a manifest error of law or fact. Harasco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985). Moreover,

> A Rule 59(e) motion is not to be used as a means "to reargue matters already argued and disposed of" by prior rulings "or to put forward additional arguments which it could have made but neglected to make before judgment."

McDowell Oil Serv. v. Interstate Fire & Casualty Company, 817 F.Supp. 538, 541 (M.D. Pa. 1993) (citations omitted) (McClure, J.).

In their motion the Plaintiffs assert, albeit in broad terms, grounds which would entitle them to the relief sought in their motion. However, in the brief supporting their motion they

> . . . urge the court to reconsider [the arguments presented in Plaintiff's Memorandum In Opposition To Defendant's Motion For Summary Judgment] in light of the fast-developing caselaw on an issue which is one of first impression in all jurisdictions known to have considered it. For this purpose, Plaintiffs hereby readopt and request the Court to incorporate into this brief all of the arguments and citations to authorities set forth in Part IIA1-3 (pages 2-17) of said Memorandum filed in this matter [on May 5, 1993].

Plaintiffs' Memorandum In Support of Motion To Vacate Judgment, page 1. That portion of the Plaintiffs' brief reveals that they essentially reargue the position they presented in their brief in opposition to North Star Steel's motion for summary judgment. The Plaintiffs have not convinced us that there has been an intervening change in controlling law, they have not presented any new evidence, and they do not identify any error in our order of May 25, 1993.

The Plaintiffs have not presented an appropriate basis for the relief sought in their motion filed pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. In our view their arguments are best characterized as disagreements which may be pursued through other avenues of relief.

NOW, THEREFORE, IT IS ORDERED THAT:

The Plaintiffs' motion to vacate the judgment entered pursuant to our order of May 25, 1993, is denied.

/s/ Muir
MUIR
U.S. District Judge

APPENDIX D

STATUTORY PROVISIONS

NATIONAL LABOR RELATIONS ACT

CHAPTER 23—WORKER ADJUSTMENT AND RETRAINING NOTIFICATION

§ 2101. Definitions; exclusions from definition of loss of employment

(a) Definitions.—As used in this chapter—

(1) the term "employer" means any business enterprise that employs—

(A) 100 or more employees, excluding part-time employees; or

(B) 100 or more employees who in the aggregate work at least 4,000 hours per week (exclusive of hours of overtime);

(2) the term "plant closing" means the permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment, if the shutdown results in an employment loss at the single site of employment during any 30-day period for 50 or more employees excluding any part-time employees;

(3) the term "mass layoff" means a reduction in force which—

(A) is not the result of a plant closing; and

(B) results in an employment loss at the single site of employment during any 30-day period for—

(i)(I) at least 33 percent of the employees (excluding any part-time employees); and

(II) at least 50 employees (excluding any part-time employees); or

(ii) at least 500 employees (excluding any part-time employees);

(4) the term "representative" means an exclusive representative of employees within the meaning of section 159(a) or 158(f) of this title or section 152 of Title 45;

(5) The term "affected employees" means employees who may reasonably be expected to experience an employment loss as a consequence of a proposed plant closing or mass layoff by their employer;

(6) subject to subsection (b) of this section, the term "employment loss" means (A) an employment termination, other than a discharge for cause, voluntary departure, or retirement, (B) a layoff exceeding 6 months, or (C) a reduction in hours of work of more than 50 percent during each month of any 6-month period;

(7) the term "unit of local government" means any general purpose political subdivision of a State which has the power to levy taxes and spend funds, as well as general corporate and police powers; and

(8) the term "part-time employee" means an employee who is employed for an average of fewer than 20 hours per week or who has been employed for fewer than 6 of the 12 months preceding the date on which notice is required.

(b) Exclusions from definition of employment loss.—(1) In the case of a sale of part or all of an employer's business, the seller shall be responsible for providing notice for any plant closing or mass layoff in accordance with section 2102 of this title, up to and including the effective date of the sale. After the effective date of the sale of part or all of an employer's business, the purchaser

shall be responsible for providing notice for any plant closing or mass layoff in accordance with section 2102 of this title. Notwithstanding any other provision of this chapter, any person who is an employee of the seller (other than a part-time employee) as of the effective date of the sale shall be considered an employee of the purchaser immediately after the effective date of the sale.

(2) Notwithstanding subsection (a)(6) of this section, an employee may not be considered to have experienced an employment loss if the closing or layoff is the result of the relocation or consolidation of part or all of the employer's business and, prior to the closing or layoff—

(A) the employer offers to transfer the employee to a different site of employment within a reasonable commuting distance with no more than a 6-month break in employment; or

(B) the employer offers to transfer the employee to any other site of employment regardless of distance with no more than a 6-month break in employment, and the employee accepts within 30 days of the offer or of the closing or layoff, whichever is later.

(Pub.L. 100-379, § 2, Aug. 4, 1988, 102 Stat. 890.)

§ 2102. Notice required before plant closings and mass layoffs

(a) Notice to employees, state dislocated worker units, and local governments.—An employer shall not order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order—

(1) to each representative of the affected employees as of the time of the notice or, if there is no such representative at that time, to each affected employee; and

(2) to the State dislocated worker unit (designated or created under title III of the Job Training

Partnership Act [29 U.S.C.A. § 1651 et seq.]) and the chief elected official of the unit of local government within which such closing or layoff is to occur.

If there is more than one such unit, the unit of local government which the employer shall notify is the unit of local government to which the employer pays the highest taxes for the year preceding the year for which the determination is made.

(b) Reduction of notification period.—(1) An employer may order the shutdown of a single site of employment before the conclusion of the 60-day period if as of the time that notice would have been required the employer was actively seeking capital or business which, if obtained, would have enabled the employer to avoid or postpone the shutdown and the employer reasonably and in good faith believed that giving the notice required would have precluded the employer from obtaining the needed capital or business.

(2)(A) An employer may order a plant closing or mass layoff before the conclusion of the 60-day period if the closing or mass layoff is caused by business circumstances that were not reasonably foreseeable as of the time that notice would have been required.

(B) No notice under this chapter shall be required if the plant closing or mass layoff is due to any form of natural disaster, such as a flood, earthquake, or the drought currently ravaging the farmlands of the United States.

(3) An employer relying on this subsection shall give as much notice as is practicable and at that time shall give a brief statement of the basis for reducing the notification period.

(c) Extension of layoff period.—A layoff of more than 6 months which, at its outset, was announced to be a layoff of 6 months or less, shall be treated as an employment loss under this chapter unless—

(1) the extension beyond 6 months is caused by business circumstances (including unforeseeable changes in price or cost) not reasonably foreseeable at the time of the initial layoff; and

(2) notice is given at the time it becomes reasonably foreseeable, that the extension beyond 6 months will be required.

(d) Determinations with respect to employment loss.—For purposes of this section, in determining whether a plant closing or mass layoff has occurred or will occur, employment losses for 2 or more groups at a single site of employment, each of which is less than the minimum number of employees specified in section 2101(a)(2) or (3) of this title but which in the aggregate exceed that minimum number, and which occur within any 90-day period shall be considered to be a plant closing or mass layoff unless the employer demonstrates that the employment losses are the result of separate and distinct actions and causes and are not an attempt by the employer to evade the requirements of this chapter.

(Pub.L. 100-379, § 3, Aug. 4, 1988, 102 Stat. 891.)

§ 2103. Exemptions

This chapter shall not apply to a plant closing or mass layoff if—

(1) the closing is of a temporary facility or the closing or layoff is the result of the completion of a particular project or undertaking, and the affected employees were hired with the understanding that their employment was limited to the duration of the facility or the project or undertaking; or

(2) the closing or layoff constitutes a strike or constitutes a lockout not intended to evade the requirements of this chapter. Nothing in this chapter shall require an employer to serve written notice pursuant to section 2102(a) of this title when permanently replacing a person who is deemed to be an economic striker under the National Labor Relations

Act [29 U.S.C.A. § 151 et seq.]: *Provided,* That nothing in this chapter shall be deemed to validate or invalidate any judicial or administrative ruling relating to the hiring of permanent replacements for economic strikers under the National Labor Relations Act. [29 U.S.C.A. § 151 et seq.]:

(Pub.L. 100-379, § 4, Aug. 4, 1988, 102 Stat. 892.)

§ 2104. Administration and enforcement of requirements

(a) Civil actions against employers.—(1) Any employer who orders a plant closing or mass layoff in violation of section 2102 of this title shall be liable to each aggrieved employee who suffers an employment loss as a result of such closing or layoff for—

(A) back pay for each day of violation at a rate of compensation not less than the higher of—

(i) the average regular rate received by such employee during the last 3 years of the employee's employment; or

(ii) the final regular rate received by such employee; and

(B) benefits under an employee benefit plan described in section 1002(3) of this title, including the cost of medical expenses incurred during the employment loss which would have been covered under an employee benefit plan if the employment loss had not occurred.

Such liability shall be calculated for the period of the violation, up to a maximum of 60 days, but in no event for more than one-half the number of days the employee was employed by the employer.

(2) The amount for which an employer is liable under paragraph (1) shall be reduced by—

(A) any wages paid by the employer to the employee for the period of the violation;

(B) any voluntary and unconditional payment by the employer to the employee that is not required by any legal obligation; and

(C) any payment by the employer to a third party or trustee (such as premiums for health benefits or payments to a defined contribution pension plan) on behalf of and attributable to the employee for the period of the violation.

In addition, any liability incurred under paragraph (1) with respect to a defined benefit pension plan may be reduced by crediting the employee with service for all purposes under such a plan for the period of the violation.

(3) Any employer who violates the provisions of section 2102 of this title with respect to a unit of local government shall be subject to a civil penalty of not more than $500 for each day of such violation, except that such penalty shall not apply if the employer pays to each aggrieved employee the amount for which the employer is liable to that employee within 3 weeks from the date the employer orders the shutdown or layoff.

(4) If an employer which has violated this chapter proves to the satisfaction of the court that the act or omission that violated this chapter was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of this chapter the court may, in its discretion, reduce the amount of the liability or penalty provided for in this section.

(5) A person seeking to enforce such liability, including a representative of employees or a unit of local government aggrieved under paragraph (1) or (3), may sue either for such person or for other persons similarly situated, or both, in any district court of the United States for any district in which the violation is alleged to have occurred, or in which the employer transacts business.

(6) In any such suit, the court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs.

(7) For purposes of this subsection, the term, "aggrieved employee" means an employee who has worked for the employer ordering the plant closing or mass layoff and who, as a result of the failure by the employer to comply with section 2102 of this title, did not receive timely notice either directly or through his or her representative as required by section 2102 of this title.

(b) Exclusivity of remedies.—The remedies provided for in this section shall be the exclusive remedies for any violation of this chapter. Under this chapter, a Federal court shall not have authority to enjoin a plant closing or mass layoff.

(Pub.L. 100-379, § 5, Aug. 4, 1988, 102 Stat. 893.)

§ 2105. Procedures in addition to other rights of employees

The rights and remedies provided to employees by this chapter are in addition to, and not in lieu of, any other contractual or statutory rights and remedies of the employees, and are not intended to alter or affect such rights and remedies, except that the period of notification required by this chapter shall run concurrently with any period of notification required by contract or by any other statute.

(Pub.L. 100-379, § 6, Aug. 4, 1988, 102 Stat. 894.)

§ 2106. Procedures encouraged where not required

It is the sense of Congress that an employer who is not required to comply with the notice requirements of section 2102 of this title should, to the extent possible, provide notice to its employees about a proposal to close a plant or permanently reduce its workforce.

(Pub.L. 100-379, § 7, Aug. 4, 1988, 102 Stat. 894.)

§ 2107. Authority to prescribe regulations

(a) The Secretary of Labor shall prescribe such regulations as may be necessary to carry out this chapter. Such regulations shall, at a minimum, include interpreta-

tive regulations describing the methods by which employers may provide for appropriate service of notice as required by this chapter.

(b) The mailing of notice to an employee's last known address or inclusion of notice in the employee's paycheck will be considered acceptable methods for fulfillment of the employer's obligation to give notice to each affected employee under this chapter.

(Pub.L. 100-379, § 8, Aug. 4, 1988, 102 Stat. 894.)

§ 2108. Effect on other laws

The giving of notice pursuant to this chapter, if done in good faith compliance with this chapter, shall not constitute a violation of the National Labor Relations Act [29 U.S.C.A. § 151 et seq.] or the Railway Labor Act [45 U.S.C.A. § 151 et seq.].

(Pub.L. 100-379, § 9, Aug. 4, 1988, 102 Stat. 894.)

§ 2109. Report on employment and international competitiveness

Two years after Aug. 4, 1988, the Comptroller General shall submit to the Committee on Small Business of both the House and Senate, the Committee on Labor and Human Resources, and the Committee on Education and Labor a report containing a detailed and objective analysis of the effect of this chapter on employers (especially small- and medium-sized businesses), the economy (international competitiveness), and employees (in terms of levels and conditions of employment). The Comptroller General shall assess both costs and benefits, including the effect on productivity, competitiveness, unemployment rates and compensation, and worker retraining and readjustment.

(Pub.L. 100-379, § 10, Aug. 4, 1988, 102 Stat. 894.)

§ 160. Prevention of unfair labor practices

* * * *

(b) Complaint and notice of hearing; answer; court rules of evidence inapplicable

Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.